

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 06.07.2021

Date of Decision : 24.08.2021

Appeal No. 473 of 2020

1. Dr. V K Sukumaran
106, Plot No. 6, Maharani CHS,
Sector – 17,
Navi Mumbai – 400 703.

2. Ms. Saritha Sukumaran
106, Plot No. 6, Maharani CHS,
Sector – 17,
Navi Mumbai – 400 703.

..... Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai – 400 051.

..... Respondent

Mr. Joby Mathew, Advocate with Mr. Anshuman Sugla,
Mr. Arihant Agarwal and Ms. Tanya Gupta, Advocates i/b
Joby Mathew & Associates for Appellants.

Mr. Suraj Choudhary, Advocate with Ms. Nidhi Singh,
Mr. Hersh Choudahry, Ms. Nipa Paka and Ms. Riddhi Pawar,
Advocates i/b Vidhii Partners for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi, Judicial Member

1. Aggrieved by the order of the Adjudicating Officer ('AO' for short) of the respondent Securities and Exchange Board of India ('SEBI' for short) dated August 5, 2020 imposing penalty on the present appellants on three counts under Section 15H of the Securities and Exchange Board of India (hereinafter referred to as 'SEBI Act'), under Section 23H of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as 'SCRA') and under Section 15A(b) of the SEBI Act, amounting to Rs. 40 lacs, the present appeal is filed by two noticees i.e. Appellant no. 1 Dr. V K Sukumaran and Appellant no. 2 Ms. Saritha Sukumaran.

2. The proceedings were initiated by respondent SEBI against seven noticees. The present appellants during the relevant period were the promoters of VKS Project Limited (hereinafter referred to as 'the Company'). The respondent SEBI found irregularities in the scrip of the Company during the period from July 18, 2012 to December 31, 2014. It was found that the present appellants along with noticee no. 3 (Mr. R. Sahadevan – alleged promoter exonerated vide same impugned order having found that he was not the promoter) had acquired more than 5% paid up share capital of the

Company in the financial year 2013-14 and therefore they were required to make an announcement of open offer in accordance with the Regulation 3(2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as 'SAST Regulations 2011'). However, it was found by SEBI that these noticees have failed to do so. During the proceedings, as detailed above, it was found that Mr. R. Sahadevan was not the promoter of the Company and therefore discharged from the present proceedings.

3. Respondent SEBI found that the Appellant no. 1 had transferred shares through off market transactions from / to noticee no. 4 Mr. Piyush Kothari, noticee no. 5 Mr. Mohammed Azhar Khan, noticee no. 6 Mr. Mehul Modi during the investigation period. Appellant no. 2 had received shares through off market transactions from notice no. 7- Mr. Nelesh Devendra Vora. It was further found that in all these off market transactions the present appellants as well as the above noticees were required to pay consideration at the same time, against the off market transactions in terms of Section 2(i) of the SCRA. However, these noticees failed to pay consideration. Further, violations of disclosure requirements

in terms of SAST Regulations and SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as 'PIT Regulations 1992') read with SEBI (Prohibition of Insider Trading) Regulations, 2015 (hereinafter referred to as 'PIT Regulations 2015') on multiple occasions were found. The proceedings therefore were launched against all the noticees. Especially against the appellants the proceeding was launched under the provisions of Section 15H of SEBI Act, 23H of SCRA and 15A(b) of the SEBI Act as detailed earlier.

4. All the transactions as detailed in the show cause notice dated April 23, 2019, were admitted by the appellants. They submitted that the delay is caused by the respondent SEBI in launching it for the violations if any of the year 2013. The details of each of the transactions, number of shares transacted in each of the transaction are given in the show cause notice. The appellants, though admitted the transactions, explained that those were not regular sell and purchase transactions inviting the penalties. They explained as under:-

- (i) That both the appellants were promoters of the Company. As on October 17, 2013 both the

appellants held 33.97% of the total paid up share capital of the Company. Those were 21,39,97,725 shares of the Company.

- (ii) The appellants were in need of finance for the Company. On October 5, 2013 Appellant no. 1 entered into an agreement with Mr. Piyush Naresh Kothari – another noticee- for providing financial assistance of Rs 3 crores against 3 crores shares of the Company. Therefore, Appellant no.1 had transferred 3 crores shares of the Company to two Beneficiary Accounts of Mr. Piyush Kothari in off market transactions. Further, on October 8, 2013 Appellant no. 1 had transferred 1.50 crore shares to noticee no. 6 Mr. Mehul Jagdishbhai Mody as security for financial assistance offered by the said noticee Mr. Mody. However, none of these noticees were able to provide financial assistance though the shares were transferred to their accounts as security. In the circumstances, Mr. Piyush Kothari, noticee no. 4, returned the said 3 crores shares to the beneficiary account of Appellant no. 1 from his two Beneficiary

Accounts (1.50 crores shares each). Another noticee no. 6 Mr. Mehul Mody did not return the shares but after great deal of persuasion and perseverance, he returned only 52,94,005 shares between November 23 to 29, 2013. The said noticee (Mr. Modi) informed that that he had transferred some of the shares off market to several persons. 25 lakhs shares were transferred by him to noticee no. 7 Mr. Nilesh Devendra Vora. After persuasion the said noticee transferred those 25 lakhs shares to the Beneficiary Account of Appellant no. 2 on November 22, 2013. Rest of the shares however could not be recovered and therefore appellants had filed a complaint with the Economic Offences Wing of the Mumbai Police.

- (iii) Thereafter the appellants received show cause notice from the respondent SEBI on April 23, 2019. Thus, the initial transfer of shares to the two noticees was only by way of securities for financial assistance as detailed above. In the circumstances, the transactions were not in the

nature of sell or purchase of the shares and there was no violation of any of the provisions as narrated above.

(iv) The learned AO however did not agree with the submissions and passed the impugned order.

5. We have heard Shri Joby Mathew, the learned counsel for the appellant and Shri Suraj Chaudhary, the learned counsel for the respondent.

6. The learned counsel for the appellants submitted before us that the shares were transferred to the two noticees by way of security for financial assistance agreed by them and upon not fulfilling the said term, the shares were retransferred to the account of the appellants. As such, there is no transaction of sell or purchase of the shares off market and therefore none of the provisions would be applicable. Further, these transactions were in the nature of providing the security towards financial assistance and return of the shares upon cancellation of the agreement, none of the appellants were liable for any penalty as there is no violation of the provisions. He further submitted that there was a delay of 6

years in launching the proceedings. On this count also he wanted that the appeal be allowed.

7. Learned counsel for the respondent SEBI submitted that the appellants had not pledged the shares with these noticees, but had transferred those shares in the demat account of the said noticees without any consideration. In the similar fashion the shares were again transferred in the demat account of the appellants in the manner as detailed (supra). At the time of the return of the transfer the provisions of SAST Regulations and PIT Regulations would come into play. Further, as the said transactions did not accompany with payment of consideration the violation of SCRA is occurred. Similarly, since none of the transactions was disclosed to the respondent SEBI hence appellants violated PIT Regulations.

8. Learned counsel for the respondent SEBI further placed reliance on the ratio of (i) *JRY Investments Private Limited vs Deccan Leafine Services Ltd. & Ors.* 2003 SCC OnLine Bom 1134 and (ii) *Liquid Holdings Private Limited vs Securities and Exchange Board of India* (Appeal No. 83 of 2010 decided on March 11, 2011).

9. In the case of JRY *Investments Private Limited (supra)* it was contended by the plaintiff therein that shares were transferred to the defendant No. 1 therein with the intention of creating security only. There was no intention of transferring the shares to defendant no. 1 therein. It was therefore submitted that the defendant no. 1 has no right to transfer the shares in favour of the rest of the defendants therein. The Bombay High Court in paragraph 31 noted that the plaintiff therein did not make any application to the depository for the creation of a pledge as contemplated by regulation 58 of the Securities and Exchange Board of India (Depositories and Participants) Regulations 1996 (hereinafter referred to as 'Depository Regulation'). The shares were undisputedly transferred in favour of defendant no. 1 and the shares were held with the depository herein was shown as the beneficial owner of the shares. The Bombay High Court therefore held that the plaintiff had conveyed their property in the shares to defendant no. 1. and the transaction had the effect of transfer.

10. In the case of *Liquid Holdings Private Limited (supra)* this Tribunal had held on the similar lines. In that case the appellant had created a pledge of the shares for a loan of Rs. 10 crore from Lakshmi Vilas Bank Limited. Upon non-

payment of the loan the pledge was invoked. Consequently, the shares were transferred to beneficial ownership account of the Bank in the record of the depository. The bank however agreed that upon settlement of the loan account, the shares would be transferred back to the appellants. The letter to that effect was also sent by the Bank. In the circumstances, appellant submitted that the transfer of the shares to the appellant later on would not amount to purchase of shares. This tribunal adverted it's attention to the Regulation 58 of the Depository Regulations, referred supra, which is as under:-

“Regulation 58

Manner of creating pledge or hypothecation.

58. (1) If a beneficial owner intends to create a pledge on a security owned by him, he shall make an application to the depository through the participant who has his account in respect of such securities.

(2) The participant after satisfaction that the securities are available for pledge shall make a note in its records of the notice of pledge and forward the application to the depository.

(3) The depository after confirmation from the pledgee that the securities are available for pledge with the pledger shall within fifteen days of the receipt of the application create and record the pledge and send an intimation of the same to the participants of the pledger and the pledgee.

(4) On receipt of the intimation under sub-regulation (3) the participants of both the pledger and the pledgee shall inform the pledger and the pledgee respectively of the entry of creation of the pledge.

(5) If the depository does not create the pledge, it shall send along with the reasons an intimation to the participants of the pledger and the pledgee.

(6) The entry of pledge made under sub-regulation (3) may be cancelled by the depository if the pledger or the pledgee makes an application to the depository through its participant: Provided that no entry of pledge shall be cancelled by the depository with the prior concurrence of the pledgee.

(7) The depository on the cancellation of the entry of pledge shall inform the participant of the pledger.

(8) Subject to the provisions of the pledge document, the pledgee may invoke the pledge and on such invocation, the depository shall register the pledgee as beneficial owner of such securities and amend its records accordingly.

(9) After amending its records under sub-regulation (8) the depository shall immediately inform the participants of the pledger and pledgee of the change who in turn shall make the necessary changes in their records and inform the pledger and pledgee respectively.

(10) (a) If a beneficial owner intends to create a hypothecation on a security owned by him he may do so in accordance with the provisions of sub-regulations (1) to (9).

(b) The provisions of sub-regulations (1) to (9) shall mutatis mutandis apply in such cases of hypothecation:

Provided that the depository before registering the hypothecatee as a beneficial owner shall obtain the prior concurrence of the hypothecator.

(11) No transfer of security in respect of which a notice or entry of pledge or hypothecation is in force shall be effected by a participant without the concurrence of the pledgee or the hypothecatee as the case may be.”

11. It was also noted that as per Section 10 of the Depositories Act, 1996 a person in whose name the shares are recorded with the depository is deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner. Further, this Tribunal considered the provisions of Section 150 of the Companies Act which requires every company to keep a register of its members and enter therein their particulars of shares held by them, as referred to in the section. Further survey of various relevant provisions was taken. Ultimately, it was held that the submissions that retransfer of the shares by the Bank to the appellant therein would not amount to acquisition of the shares cannot be accepted. It was held that such arguments would mean circumventing Takeover Code and Regulation 58 of the Depository Regulations, which cannot be permitted. It was further found that when the law prescribes course for creation of a pledge of shares, the parties cannot agree to

create a pledge contrary to the SAST Regulations. Considering all these facts the contention of the appellants was negatived and the appeal against the order of the respondent SEBI was dismissed.

12. Taking into consideration all these factors and the law as crystallized, in our view, the submissions of the appellants cannot be accepted. It is an admitted fact that the shares were transferred to the concerned noticees. Thereafter the shares were again transferred in the demat accounts of the appellants in the similar fashion. Appellants have thus violated the provisions of the regulations detailed above. The order of the AO, therefore cannot be faulted.

13. As regards the issue of delay in launching the proceedings, we find that no plea is taken that the delay has caused any prejudice. Delay simpliciter, if any would not lead us to quash the proceedings initiated by SEBI.

14. As regards the quantum of penalty, the learned AO has imposed the penalty against the Appellants of Rs. 10 lakh under Section 15H of SEBI Act jointly and severally, under Section 23H of SCRA of Rs. 10 lakh each and Rs. 10 lakh only on the Appellant no. 1 under Section 15A(b) of the SEBI

Act. Considering the fact that the violations were made on several occasions as detailed in the impugned order, we do not find any reason to interfere in the impugned order in this regard also.

15. The appeal is therefore dismissed with no order as to costs.

16. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

24.08.2021
msb